



**CONFIDENTIALITY AGREEMENT BETWEEN THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY AND THE STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY REGARDING SETTLEMENT
NEGOTIATIONS WITH W.R. GRACE AND KOOTENAI DEVELOPMENT COMPANY
ON MATTERS RELATING TO OU3 OF THE LIBBY ASBESTOS SITE**

WHEREAS, the United States Environmental Protection Agency (EPA), intends to engage in settlement negotiations with W.R. Grace & Company, W.R. Grace & Co. - Conn., and Kootenai Development Company (Respondents) to arrange for the Respondents' performance of an OU3 Remedial Investigation/Feasibility Study (RI/FS) and ultimately a Remedial Design/Remedial Action (RD/RA) under the Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. §9601 et. seq., (CERCLA);

WHEREAS, the State of Montana Department of Environmental Quality (DEQ) intends to participate in the settlement negotiations with Respondents pursuant to 40 CFR §300.520(b);

WHEREAS, this Agreement shall be applicable to and binding upon EPA and the DEQ, including its agencies, (individually "Party" and collectively "Parties");

WHEREAS, the Parties intend to coordinate and work together in settlement negotiations with the Respondents;

WHEREAS, the Parties share close and common interests in pursuing settlement negotiations with the Respondents and wish to work together to protect their common interests by communicating in confidence about claims, settlement strategy and other subjects pertaining to the above-described claims and settlement negotiations. The Parties accordingly agree that the sharing of information by their employees, consultants, agents and counsel will further their common enforcement goals;

WHEREAS, the Parties do not intend through their consultations or communications, either before or after the initiation of litigation, to waive any privileges such as, but not limited to, attorney-client and work product privileges, which would otherwise attach to any information, documents, or communications shared among the Parties. The Parties specifically intend that all such privileges shall be preserved, and that privileged information shall be protected from disclosure to the Respondents or to any third party, except with respect to disclosure agreed to by the Parties, as required by Court order, or otherwise mandated pursuant to federal law.

NOW THEREFORE, the Parties hereby agree as follows:

1. Non-Waiver. By exchanging documents and communications with each other, the Parties do not waive any privilege, immunity, or other basis for confidentiality that otherwise applies to these documents and communications.

2. Confidentiality. If the Parties exchange any document or record of communication with each other that otherwise is claimed to be privileged, confidential business information, immune from disclosure to the public, or subject to any other legal claim of confidentiality, the Party sending such document or record of communication shall identify the sender and shall stamp or otherwise mark each such document or record of communication as “privileged and confidential” or “CBI”(confidential business information, CBI, claimed CBI, or claimed confidential business information).. The Party receiving such document or record of communication shall take measures to ensure that each such document or communication remains confidential, including but not be limited to: (a) maintaining each such document or record of communication in a separate file from non-privileged documents or electronically designating the document as privileged

in a database; (b) restricting access to any privileged file, document or record of communication to the receiving Party's authorized employees and consultants; (c) requiring the Party's employees and consultants to maintain the confidentiality of any privileged document or record of communication, including but not limited to litigation or settlement plans, offers or strategy; and (e) asserting the appropriate privilege(s) to decline any requested disclosure of any such document or record of communication to any person who is not a Party to this Agreement.

3. Disclosure by Agreement. As allowed by applicable law, Parties may disclose documents, communications, or information to non-parties with the express, written permission of the authorized representative of the Party who provided the information and the consent of the other Parties, or as required by court order or as otherwise required by federal law.

4. Inadvertent Disclosure. Any disclosure by a Party that is inconsistent with this Confidentiality Agreement shall not waive the confidentiality of such documents or communications.

5. Common Interest Privilege. The Parties agree and acknowledge that the common interest privilege and confidentiality established by this Agreement is held jointly by both Parties and that the Parties are not authorized to unilaterally waive the privilege with respect to any information or documents shared pursuant to this Agreement.

6. Necessary Measures. Each Party shall take all necessary and appropriate measures to ensure either that any person who is granted access to any confidential information or documents shared pursuant to this Agreement is familiar with the terms

of the Agreement and complies with such terms as they relate to the duties of such person or that an official records center regulates the dissemination of the information in accordance with this Agreement.

7. Public Records Law. The Parties acknowledge that the information and documents are subject to the Freedom of Information Act, and that certain documents and information that may be exchanged may be exempt from disclosure under 5 U.S.C. §552(b), and that furnishing such information or documents to the Parties shall not invalidate the application of any such exemption.

8. Confidential Business Information. The Parties agree that EPA is subject to certain requirements for the protection of confidential business information, as found at 40 C.F.R. Subpart B. The State agrees that it has, and will assert, the authority to protect in the same manner as required of EPA all documents provided by EPA which are marked as "Confidential Business Information", "CBI", "Claimed Confidential Business Information" or "Claimed CBI".

9. Termination. Any Party may terminate its participation in this Agreement by thirty (30) days prior written notice to the other Parties. However, the provisions of this Agreement, including the confidentiality requirements of paragraph 2, shall continue to apply to all documents and communications exchanged prior to or during the pendency of this Agreement. The terminating Party shall return all copies of privileged documents provided pursuant to this Agreement upon request by the Party who provided the information.

10. Counterparts. This Agreement may be executed in counterparts.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: _____

By: _____

David Janik, Acting Director
Legal Enforcement Program
United States Environmental Protection Agency

FOR THE STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY:

Date: _____

By: _____
Richard H. Oppen, Director
Montana Department of Environmental Quality